FILE
OCT 1. 1971
E. ROBERT SEAVER, CLERK

No. 70-45

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
JEROME M. FEIT,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

I. APPEALABILITY

The basis for our position that the order dismissing the indictment in this case is directly appealable to this Court (under 18 U.S.C. 3731 (Supp. V) as it read prior to the 1970 amendment) is set forth in our opening brief at pp. 5–10. Nothing appellee has argued, in our judgment, weakens that position. At its core all that his argument has shown is that the unamended statute is lacking in clarity, has engendered confusion in application and lends itself to nice technical arguments. See *United States v. Sisson*, 399 U.S. 267, 307–308. His claims do not, however, detract from the fact that the order here is appealable under either

445-360—71——1

the "invalidity * * * of the statute" or "motion in bar" provisions of the Act.

As we see it, a basic flaw in appellee's position lies in his effort to interweave substance with procedure. We, of course, do not dispute the central importance of the congressional privilege; we do not see, however, why that importance bars an appeal in the present context. The district court did not enter a summary judgment in favor of appellee (see Appellee's Brief, pp. 9–15). It specifically made clear it was dismissing the indictment (App. 33). Under the "invalidity * * * of the statute" branch of our argument, we perceive no difference between the dismissal here and, for example, a case in which the dismissal had been based on the ground of a First or Fifth Amendment claim. The effect of the ruling is that as to a certain class of cases—here a Congressman charged with receiving bribes where the bribe-taking had a relationship to legislative conduct—the bribery statute cannot validly be applied. Appellee, in short, has failed to take this case outside the reach of *United States* v. *Knox*, 396 U.S. 77, 79 n. 2, discussed in our main brief at pp. 5–8.

Equally unpersuasive is appellee's contention that jurisdiction does not lie under the "motion in bar" clause—the alternative branch of our jurisdictional claim—because he had not confessed to the commission of any crime (Appellee's Brief, p. 19). The ruling in *United States* v. *Weller*, 401 U.S. 254, does not aid appellee here. In that case the defendant had simply argued that he committed no crime based on facts appearing on the face of the administrative record (401

U.S. at 260–261). Here, however, the defense is one of immunity—in appellee's words that he "is charged with no act which may constitutionally be made a crime even if such act occurred" (Appellee's Brief, p. 19). As *Weller* makes clear, such a claim of immunity, no matter how verbalized, is a claim of "confession and avoidance" and falls within the traditional meaning of "motion in bar."

II. THE SPEECH OR DEBATE CLAUSE

On the merits, the core dispute in this case concerns fundamental differences as to the exercise of the constitutional power of Congress. At its essence, appellee's position is that by the Speech or Debate Clause the Framers left the Congress with no prerogatives; that only the body in which a member sits can impose punishment upon him for any dereliction which, while not aimed at legislative speech or debate, may indirectly involve inquiry into legislative conduct. One purpose of the historical discussion in our opening brief was to show that in formulating the Speech or Debate Clause the Framers did not intend the adoption of such a rigid rule. The clause was not meant to have the consequence of rendering Congress impotent to exercise its legislative authority under Article I, Sections 1 and 8, to enact a statute authorizing a judicial trial of a member who accepts a bribe. We add only a few comments to our original argument on this point.

1. The immunity provided by the constitutional provision is not for the purpose of protecting the individual legislator but to protect the legislative proc-

ess itself; the aim is to assure that legislators "are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation" *Powell* v. *McCormack*, 395 U.S. 486, 503. The Speech or Debate Clause confers no immunity if Congress itself chooses to punish a bribe-taking member even where the bribe is related to his legislative conduct. However far Congress may go in this regard by direct disciplinary action,[1] we do not suggest that it may grant any broader power to the courts for this would squarely undercut the important values the Speech or Debate Clause was meant to protect. Undoubtedly, Congress cannot make legislative speech or conduct a crime subject to judicial trial and punishment. Such a statute would be wholly at odds with the privilege. But that is not what we are urging. Our position is that the Speech or Debate Clause does not carry any further; it does not prohibit Congress from passing a narrowly drawn statute punishing the receipt of a bribe. It is one thing to hold that free and uninhibited legislative action is such an important right that, in order to protect it from erosion, protection must be given to any legislative speech or debate no matter how unworthy its purpose. See *Tenney* v.

[1] Of course, there may be restraints on institutional congressional action stemming from other constitutional protections such as the First Amendment. See *Bond* v. *Floyd*, 385 U.S. 116, 132–137; cf. *Powell* v. *McCormack*, *supra*, 395 U.S. 486, 548: "Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds."

Brandhove, 341 U.S. 367, 377. It is quite a different thing to say that the clause was meant to immunize a Congressman for a corrupt agreement which would be a crime whether he engaged in legislative conduct or not. The historical analysis in our opening brief indicating that the Framers were fully aware of the need for the privilege and yet aware of legislative abuses, suggests that they intended to give Congress leeway in this limited fashion in determining how best to serve the aim of the legislative privilege and yet preserve the purity of the legislative process.

2. Appellee argues that prior to 1853 when Congress enacted the first statute making it a crime for members to accept bribes in return for the performance of legislative acts,[2] bribe-taking by a legislator was not an indictable offense (Appellee's Brief, pp. 36–37). Early Congresses did not regulate such conduct by statute, the argument runs, because of an awareness that they were powerless to do so by virtue of restrictions inherent in the privilege of freedom of speech and debate. There is, however, a less conjectural explanation to be found in the practice of the English Parliament and the extent to which the colonial legislatures and the early Congresses were, quite naturally, influenced by that practice. In this respect, the significant difference in the posture of the English Parliament vis-à-vis Congress indicates that while the antecedents of the Speech or Debate Clause are to be found in parliamentary experience, parliamentary practices are by no means a reliable measure of what constitutes appro-

[2] Act of February 26, 1853, c. 81, 10 Stat. 170, 171.

priate congressional action in the realm of legislative privilege. We have discussed the *lex parliamenti* in our opening brief. Our purpose was to show that this principle was broader than the freedom of speech or debate and was not carried over to this country (see Govt's Br., pp. 15–16, n. 12). Parliament's exclusive regulation of the conduct of its members thus stems from a broad exercise of power rejected by this country (see *Watkins* v. *United States*, 354 U.S. 178), and not from the Speech or Debate Clause. The fact that Parliament has not made bribe-taking in return for the performance of legislative acts a statutory offense[3] is no justification for concluding that Congress lacks the power to do so. Accordingly, while the Speech or Debate Clause prohibits the courts—and Congress may not direct to the contrary—from ques-

[3] Certain offenses, regarded by Parliament as a breach of privilege and, thus, contempt of its authority, are also offenses at law. If for some reason Parliament prefers that the offense be handled by the ordinary tribunals, it will direct the Attorney General to prosecute the offender. May, *The Law, Privileges, Proceedings and Usage of Parliament*, 103 (Fourteenth ed., Campion 1946). Thus, while Parliament may choose to exclude the jurisdiction of the courts, it may exercise the prerogative of invoking that jurisdiction when desirable. See also *Myddleton* v. *Wynn*, 125 Eng. Rep. 1339, 1344 (Ex. Ch., 1745), in which the court rejected the argument that a statute vesting jurisdiction in the courts with respect to certain matters governing the election of members of Parliament was invalid because Commons possessed the sole authority to judge of the elections of its members. In rejecting this claim, the court noted, "it is certain that an Act of Parliament may give the Courts at Westminster a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is *party to every Act and therefore bound by it*" (emphasis added).

tioning legislative speech or debate, it does not prevent Congress from enacting a statute providing for the punishment of its members who solicit or accept a bribe even though this may tangentially entail some inquiry into legislative acts or motives.

3. In what it has deemed to be a necessary and proper exercise of its constitutional authority, Congress has since 1853 enacted statutes which prohibit the taking of bribes by Congressmen in return for their influence with respect to legislative acts. A statute such as 18 U.S.C. 201 prescribing a specified standard of conduct and specifically applying that standard to congressmen reflects the exercise of congressional discretion in an area of determination reserved to it by the Constitution. Congressional enactment of such a statute does no violence to the Speech or Debate Clause since it punishes the solicitation or acceptance of a bribe, not legislative speech or debate. It is thus a logical and proper exercise of the authority which the Speech or Debate Clause did not intend to remove. A Senator or Representative enjoys no immunity from prosecution under 18 U.S.C. 201 not because the statute purports to deprive him of that immunity, but because the Speech or Debate Clause confers no immunity when Congress acts to regulate the conduct of its members for accepting bribes.[4]

It is this considered judgment to enact a statute setting forth a judicial procedure for the punishment of corrupt members which underlines the difference

[4] The statutory language thus focuses on and proscribes the bribe-taking not legislative speech or debate (see pp. 2–3 of our opening brief).

between this case and *Johnson*, which involved prosecution under a statute of general applicability.[5] The Speech or Debate Clause makes clear that Congress in the first instance has the power to punish its members for misconduct; the Clause further protects against any watering down of its protections by a catch-all criminal statute. On the other hand, the Clause should not be read as inharmonious with Congress' power under Article I, Sections 1 and 8. In short, it does not prohibit Congress from defining certain conduct and providing sanctions—as it has done in 18 U.S.C. 201—which involves the solicitation or receipt of a bribe and to provide that these matters should be tried by the courts. Such a statute does not focus on legislative conduct but on the non-legislative act of soliciting or accepting money improperly. Thus, appellee's assertion (Appellee's Brief, pp. 27–29) that there is no difference between this case and *Johnson* misses the point of our argument. The difference is critical since the prosecution in *Johnson* reflected an act of executive initiative which necessarily follows from a statute of general applicability; the prosecution here, on the

[5] It should be noted that three members of this Court in *Johnson* concurred in what they deemed to be the "limited holding" in that case—namely "that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech or Debate Clause." *United States* v. *Johnson*, 383 U.S. 169, 186 (concurring opinion of Mr. Chief Justice Warren, joined by Justices Douglas and Brennan). At the very least, this suggests that the concurring Justices may have entertained a different view if the inquiry into legislative action was marginal, even under a general criminal statute.

other hand, stemmed from Congress' expression of intent as to how it wished the charge of bribe-taking by members to be handled.[6]

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the cause remanded with directions to reinstate the dismissed counts of the indictment.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys.

SEPTEMBER 1971.

[6] The argument that the statute is not "narrowly drawn" (Appellee's Brief, pp. 72–84) is answered in our opening brief and no further elaboration is necessary. We note only that because Congress enacted a different type of statute as to non-members who act contumaciously before it proves only that it was dealing with a different subject matter which, by its inherent nature, is subject to a more precise definition.

U.S. GOVERNMENT PRINTING OFFICE: 1971